No. 14-1143

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHADRIN LEE MULLENIX,
IN HIS INDIVIDUAL CAPACITY,

Petitioner,

v.

BEATRICE LUNA, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ISRAEL LEIJA, JR.; CHRISTINA MARIE FLORES, AS NEXT FRIEND OF J.L. AND J.L., MINOR CHILDREN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS AND NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONER

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Emery G. Lee III, Fed. Judicial Ctr., *National Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* (2009).. 5

Cited Authorities

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Gregory McMahon, "Deployment of Spike Strips," *FBI Law Enforcement Bulletin*, Sept. 2012 15

H. Range Hutson *et al.*, "A Review of Police Pursuit Fatalities in the United States from 1982-2004," *Prehospital Emergency Care*, Jul.-Sept. 2007 8

Patrick T. O'Connor & William L. Norse, *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 Mercer L. Rev. 511 (2006)..... 8

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The National Association of Police Organizations ("NAPO") is a coalition of police units and associations from across the United States. It was organized for the purpose of advancing the interests of America's law enforcement officers. Founded in 1978, NAPO is the strongest unified voice supporting law enforcement in the country. NAPO represents over 1,000 police units and associations, over 241,000 sworn law enforcement officers, and more than 100,000 citizens who share a common dedication to fair and effective law enforcement. NAPO often appears as *amicus curiae* in cases of special importance.

The National Sheriffs' Association ("NSA") is a non-profit association formed under 26 U.S.C. 501(c)(4). Formed in 1940, the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and in particular to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members and is the advocate for 3,083 sheriffs throughout the United States. The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in the judicial process where the vital interests of law enforcement and its members are affected.

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1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

Amici have a strong interest in this case because the Fifth Circuit's opinion eliminates critical qualified-immunity protections upon which *Amici*'s members rely. Police officers, sheriffs, and other law enforcement officers all depend on the courts to protect them from the burdens of personal-liability lawsuits. If the Fifth Circuit's opinion is allowed to stand—where an officer is denied qualified immunity despite the fact that the fleeing suspect drove recklessly for more than 25 miles at speeds of 110 miles per hour, was believed to be intoxicated, and threatened to shoot police officers—law enforcement will think twice before acting assertively to end high-speed chases. This is a dangerous result for officers and the general public. *Amici* thus write to urge the Court to grant certiorari.

SUMMARY OF THE ARGUMENT

Robust qualified immunity is essential to police officers and the public they are sworn to protect. By giving officers "breathing room to make reasonable but mistaken judgments," *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), qualified immunity ensures that only those officers who "knowingly violate the law" or act in a way that is "plainly incompetent" will face the enormous burden of litigation. *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013).

Amici can attest to the importance of qualified immunity. When officers are sued for actions taken in the line of duty, they suffer personally and professionally: they are unable to work because they must deal with the burdens of litigation, and the threat of personal liability from punitive damages puts enormous strain on their emotional and financial wellbeing. Worse still, the threat of personal-liability lawsuits places police officers and

innocent bystanders in danger because officers may "be induced to act with an excess of caution." *Forrester v. White*, 484 U.S. 219, 223 (1988). Nowhere is this hesitancy more problematic than in high-speed chases, through which dozens of police officers and innocent bystanders die every year. Instead of acting with caution, police officers must act assertively in high-speed chases to bring these dangerous situations to an end.

The Fifth Circuit ignored all of these concerns in denying qualified immunity to Officer Mullenix. In doing so, the court ignored undisputed facts showing the situation's dangerousness, the speed with which events were unfolding, and the culpability of the fleeing suspect, Israel Leija, Jr. In particular, the Fifth Circuit denied qualified immunity despite the fact that Leija had been driving in the dark of night for more than 18 minutes and 25 miles at speeds up to 110 miles per hour; was believed to be intoxicated; and had twice called 911 and threatened to shoot any police officer he saw. Under such circumstances, Officer Mullenix's decision to attempt to disable Leija's vehicle was eminently reasonable.

In holding otherwise, the Fifth Circuit appeared to believe that the threat Leija caused was not "sufficiently imminent" and so Officer Mullenix should have allowed the car chase to continue. In particular, the Fifth Circuit placed great weight on the potential availability of tire spikes to terminate the chase. But that reasoning is flawed. Officers have no obligation to allow dangerous high-speed chases to continue on the hope that they might be terminated through the use of non-deadly force. Yet even if such a rule existed, the fact that another officer was setting up tire spikes to slow down Leija's vehicle does not

change the analysis. Tire spikes are dangerous—to both officers and the general public—and are not a cure-all. Even when officers deploy tire spikes, fleeing suspects frequently continue to drive recklessly by either careening around them or continuing to drive on deflated tires. There was simply no justification for denying qualified immunity based on a judicial faith in such devices.

ARGUMENT

I. Qualified Immunity Is Critically Important To Police Officers And The Public They Are Sworn To Protect.

The doctrine of qualified immunity "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231. Qualified immunity thus shields government officials from the heavy burdens of litigation unless their actions in the line of duty violate "clearly established" law. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). In other words, unless a government official "knowingly violate[s] the law," or acts in a way that is "plainly incompetent," he is entitled to qualified immunity and prompt dismissal. *Stanton*, 134 S. Ct. at 5.

The qualified-immunity doctrine vindicates critical public policies. As the Court has explained, personal-liability lawsuits "diver[t] official energy from pressing public issues." *Harlow*, 457 U.S. at 814. Every minute an officer is distracted in the litigation process—producing

documents, responding to discovery, preparing for depositions, attending and giving depositions, developing case strategy, and preparing for and attending trial—is one less minute the officer is performing the job he or she was hired to do: protecting the public. As the Court has thus explained, the "driving force" behind the creation of the qualified immunity doctrine was a desire to ensure that "insubstantial claims against government officials will be resolved prior to discovery" so that officers can focus on serving and protecting the public. *Pearson*, 555 U.S. at 232; *see also Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (qualified immunity protects officials from the "demands customarily imposed upon those defending a long drawn out lawsuit").

Personal-liability lawsuits also deter "able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. These lawsuits impose enormous costs on officers. On a professional level, they hinder career advancement, as officers must live under the shroud of suspicion until the allegations against them are dismissed. These suits also impact officers' personal lives. While they will often be indemnified against litigation costs and judgments,[2]

2. Personal-liability suits thus impose enormous costs on state and local governments that must defend against these suits. The median cost of being a defendant in federal court is $20,000. *See* Emery G. Lee III, Fed. Judicial Ctr., *National Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* at 37 (2009). When discovery is involved, the median cost triples to $60,000. *Id.* By comparison, the median annual salary of police officers is about $56,000. United States Department of Labor, Bureau of Labor and Statistics, *available at* http://www.bls.gov/oes/current/oes33051/oes333051.htm. Needless to say, governments would

many officers still face the prospect of personal liability if punitive damages are imposed. This threat of punitive damages can cause real harm. For example, an officer applying for a home or car loan would likely have to disclose the possibility of liability if he were a defendant in a lawsuit, which could prevent him from securing a loan.[3] Officers also might see their personal lives invaded through discovery, as they might be forced to disclose their personal finances because such information might be relevant when assessing punitive damages. *See, e.g., P. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

Absent qualified immunity, bright, capable people—precisely the men and women who should be put in a uniform—will refrain from donning the badge. This will leave communities with only the "most resolute or the most irresponsible." *Crawford-El v. Britton*, 523 U.S. 574, 590 n.12 (1998). That clearly would not be in the public interest.

Finally, the threat of personal-liability lawsuits can cause police officers to hesitate and act tentatively. The threat of liability may induce government officials "to act with an excess of caution or otherwise to skew their

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be better served by using their limited funds to hire more police officers rather than defend against these lawsuits.

3. For example, prospective borrowers must disclose all pending litigation on Fannie Mae's Uniform Residential Loan Application. *See* Uniform Residential Loan Application, at https://www.fanniemae.com/ content/guide_form/1003irev.pdf, at 3, § VIII(d) (last visited Apr. 16, 2014). Certainly if there is a risk of personal liability that would not be covered by a state's, county's, or municipality's indemnification procedure (i.e., punitive damages), then the official's attractiveness as a borrower diminishes considerably.

decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Forrester*, 484 U.S. at 223. Ultimately, exposing government officials to the same legal standards as ordinary citizens "may detract from the rule of law instead of contributing to it." *Id.*

An officer's reticence can endanger both the public and police officers themselves. Undoubtedly, everyone is safer when officers act swiftly and exercise discretion in combatting crime and protecting the public. As one FBI official has explained:

> Law enforcement effectiveness often depends on officers' confidence and willingness to act swiftly and decisively to combat crime and protect the public. However, the fear of personal liability can seriously erode this necessary confidence and willingness to act. Even worse, law enforcement officers ... may become overly timid or indecisive and fail to arrest or search—to the detriment of the public's interest in effective and aggressive law enforcement.

Daniel L. Schofield, *Personal Liability: The Qualified Immunity Defense*, FBI Law Enforcement Bulletin, Mar. 1990, *available at* https://www.ncjrs.gov/pdffiles1/Digitization/123809NCJRS.pdf.

Nowhere is this assertiveness needed more than in high-speed police chases. Such chases are extraordinarily dangerous to the public. And, law enforcement officers often are the only line of defense against criminals who terrorize the highways through frightening, reckless,

and menacing driving. It is the duty of law enforcement to face these dangers head on and protect the public from further harm.

When police fail to end a high-speed chase quickly, the results are often deadly, as evidenced by the hundreds of people who die every year in the United States as a result of high-speed chases. *See* H. Range Hutson et al., *A Review of Police Pursuit Fatalities in the United States from 1982-2004*, Prehospital Emergency Care, Jul.-Sept. 2007, at 278. Between 1982 and 2004, there were 7,430 fatalities as a result of high-speed chases. Of these, 2,075 individuals were not in the reckless car leading the chase, but rather were police officers, occupants of another vehicle, or individuals outside of the vehicles. *Id.* In other words, every year dozens of police officers and innocent bystanders die as a result of fleeing suspects. *Id.*; *see also* Patrick T. O'Connor & William L. Norse, *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 Mercer L. Rev. 511, 511-12 (2006) (noting that in 2003 of the 350 people who died as a result of high-speed chases more than a hundred were innocent bystanders).

Indeed, state-court decisions in which high-speed chases killed innocent bystanders or police officers are sadly too numerous to fully catalog here. *See, e.g.*, *People v. Prindle*, 944 N.E.2d 1130, 1131-32 (N.Y. 2011) (second degree manslaughter conviction for killing innocent bystander after fleeing from police); *People v. Moore*, 114 Cal. Rptr. 3d 540, 542 (Cal. Ct. App. 2010) (second degree murder conviction for leading police on high speed chase that caused an accident killing innocent bystander); *McKinley v. State*, 945 A.2d 1158, 1159-61 (Del. 2008)

(second degree murder conviction for striking and killing innocent motorist while leading police on a high speed chase); *O'Neal v. State*, 236 S.W.3d 91, 99-100 (Mo. Ct. App. 2007) (second-degree felony murder conviction for leading police on chase in which two bystanders were killed when the officer's car collided with their vehicle); *Michelson v. State*, 805 So.2d 983, 984-87 (Fla. Dist. Ct. App. 2001) (third degree felony murder conviction for killing innocent motorist while fleeing from police at high speeds); *State v. Pantusco*, 750 A.2d 107, 109 (N.J. Super. Ct. App. Div. 2000) (felony murder conviction for causing death of innocent motorist while fleeing from police); *State v. Lovelace*, 738 N.E.2d 418, 420-21 (Ohio 1999) (involuntary manslaughter conviction for leading police on chase in which officer struck and killed third party) *State v. Chambers*, 589 N.W.2d 466, 470 (Minn. 1999) (first degree murder conviction for killing police officer by striking police roadblock at the end of high speed chase); *Lester v. State*, 737 So.2d 1149, 1150-52 (Fla. Dist. Ct. App. 1999) (vehicular homicide conviction for striking and killing innocent bystander while fleeing from police); *Meeks v. State*, 455 S.E.2d 350, 351-53 (Ga. Gt. App. 1995) (vehicular homicide convictions for striking and killing police officer while leading other officers on high speed chase).

In all of these cases, fleeing suspects become killers, and their vehicles become murder weapons. The Fourth Amendment does not require an officer to "simply cease[] [his] pursuit" of a reckless motorist and "hope[] for the best." *Scott*, 550 U.S. at 385. A fleeing suspect will not simply slow down and no longer drive recklessly once the police have ceased their pursuit. *Id.* Instead, the suspect will likely continue to drive recklessly in an attempt to get

as far away as possible. *Id.* Thus, a rule requiring police not to pursue fleeing criminals would create perverse incentives, as suspects would be encouraged to flee as dangerously as possible so that pursuit would cease. *Id.* at 385-86. No police force would condone such a rule, and the Fourth Amendment does not require it.

Faced with these situations—fleeing suspects who are putting countless innocent lives in danger—it is imperative that police officers remain free to use their best judgment to resolve the situation. Police officers ordinarily do not have the time to "err on the side of caution." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991); *see also Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012) ("[A]voiding unwarranted timidity on the part of those engaged in the public's business ... [e]nsur[es] that those who serve government do so with the decisiveness and the judgment required by the public good"). They must act swiftly and decisively with the confidence that they have "breathing room to make reasonable but mistaken judgments" without facing unwarranted litigation. *Pearson*, 555 U.S. at 231.

In sum, qualified immunity serves essential public policies. When courts erode this protection by deflecting the qualified immunity question to a jury under a belief that reasonable minds could reach differing conclusions to the objective reasonableness of a seizure—as the Fifth Circuit did here—these critical safeguards become weakened. This Court regularly stands guard against such encroachments. *See, e.g., Carroll v. Carman*, 135 S. Ct. 348, 352 (2014); *Lane v. Franks*, 143 S. Ct. 2369, 2381 (2014); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021-23; *Wood v. Moss*, 134 S. Ct. 2056, 2070; *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013); *Reichle v. Howards*, 132 S. Ct. 2088,

2093 (2012); *Ryburn v. Huff*, 132 S. Ct. 987, 990 (2012); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084-85 (2011). It should do so here.

II. The Fifth Circuit's Decision Blatantly Disregards This Court's Qualified-Immunity Precedent.

Qualified immunity shields government officials from money damages unless a plaintiff can make two showings. First, the plaintiff must plead facts showing that "the official violated a statutory or constitutional right." *al-Kidd*, 131 S. Ct. at 2080 (quoting *Harlow*, 457 U.S. at 818). Second, the plaintiff must plead facts showing "the right was 'clearly established' at the time of the challenged conduct." *Id.* (quoting *Harlow*, 457 U.S. at 818). Respondent can make neither showing.

Under the first prong, the officer does not violate the Fourth Amendment unless his actions are objectively unreasonable. *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987). In making this determination, the Court "allow[s] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Plumhoff*, 134 S. Ct. at 2020. The officer's conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*; *see also Saucier v. Katz*, 533 U.S. 194, 207 (2001) (allowing courts to consider only the facts known to the officer "when the conduct occurred").

Here, while reasonable people can debate whether Officer Mullenix made the *right* decision, there is no question that his actions were *reasonable*. Nothing else

matters. When Officer Mullenix reached the overpass over I-27 and got into position to intercept Leija, it is undisputed that he knew the following:

- About 20 minutes earlier in Tulia, Texas, a police officer had attempted to serve an arrest warrant on Leija and Leija had fled the scene. Fifth Circuit Record on Appeal ("ROA") 571-572, 867, 869.

- For more than 26 miles, Leija had led police on a high-speed chase up I-27 at speeds ranging from 85 to 110 mph. ROA 571-572, 867, 869.

- Multiple officers were trying to catch Leija. In addition to Mullenix, Officer Rodriguez was the lead officer chasing Leija; Officer Troy Ducheneaux was setting up tire spikes underneath the overpass where Mullenix was positioned; and other officers prepared to set up tire spikes at two locations farther north on I-27. ROA 572, 574, 871.

- Leija twice called 911 and threatened harm to police officers. On the first call, Leija threatened to kill the officer following him. On the second call, Leija threatened to kill any officer he saw. *See* ROA 869 (dashcam stating Leija "will shoot any officer he sees"); *see also id.* at 566-570; *id.* at 572; *id.* at 871, Recording No. 4; *id.* at 871, Recording No. 9 (stating "he advised he is armed and will use it").

- Leija might have been intoxicated. *See* ROA 871, Recording No. 23 (stating that the "subject may be intoxicated"); *see also id.* 572, 569-570.

- As Leija approached, Mullenix believed he had two options: shoot Leija's car in an attempt to disable his engine block and end the high-speed chase, or do nothing and hope that Leija was stopped in another manner (e.g., through tire spikes or other police maneuvers). ROA 573-575.

- Mullenix knew that doing nothing might cause harm to police officers, as officers are regularly injured in the process of laying tire spikes. He knew one of his trainers had been shot standing on the side of the road waiting on a high-speed pursuit. He also knew that officers must exit their vehicle to set out spikes. And he knew Officer Ducheneaux was under the bridge with his lights flashing and would be an easy target for Leija. ROA 572-574.[4]

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4. The radio dispatch recorded a conversation between Officer Ducheneaux and Officer Mullenix:

> Officer Ducheneaux: "Chad do you know a 24 yet?"
>
> Officer Mullenix: "He just advised at Randall County line still north bound at 110. Subject in vehicle is calling and says will shoot any officer he sees, so be careful with the spikes."
>
> Officer Ducheneaux: "10-4, will try to set up spikes at Cemetery Road and 217 as well."
>
> Officer Mullenix: "10-4. I may go on bridge at Cemetery road with rifle and see what kind of shot I can get.'
>
> Officer Ducheneaux: "10-4."

ROA 871, Recording No. 8.

- Mullenix also knew that if he did nothing, innocent bystanders would continue to be in danger, because even if Leija's vehicle ran over the tire spikes, Leija could continue to drive at high speeds, allowing him not only to shoot Officer Ducheneaux, but also other officers north of the overpass. ROA 574.

- Mullenix had to act quickly, as Leija's vehicle was rapidly approaching his position. ROA 757, 869.[5]

Mullenix chose to act. By engaging Leija's vehicle, Mullenix stopped the high-speed chase and prevented innocent lives (including bystanders and police officers) from being lost. Mullenix's actions were no different from those of the officers in *Scott* and *Plumhoff*. Indeed, the car chase here was arguably *more* dangerous. Compared to the driver in *Plumhoff*, Leija drove faster (110 mph versus 100 mph), drove for almost four times as long (about eighteen minutes versus five minutes), and never came to a stop (the driver in *Plumhoff* "came temporarily to a near standstill"). *See Plumhoff*, 134 S. Ct. at 2021; *see also Scott*, 550 U.S. at 374 (noting that the suspect drove at speeds over 85 miles per hour for six minutes and nearly ten miles). If the officers in these cases acted reasonably, so too did Officer Mullenix.

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5. According to Officer Mullenix's dashcam, the entire event—Officer Mullenix arriving on the scene, talking to Trooper Rodriguez, exiting his vehicle, retrieving his rifle, running into position, and firing his weapon—occurred in less than three minutes. *See* ROA 869 (showing Officer Mullenix arriving at the bridge at minute 9:04 and firing his weapon at minute 11:46).

In holding otherwise, the Fifth Circuit made two principal findings: (1) the high-speed chase "occurred in rural areas, without businesses or residences near the interstate" and Leija "did not run any vehicles off the road," Pet. App. 26a-27a, and (2) officers were setting up tire spikes behind Officer Mullenix and so there might have been other opportunities to subdue Leija, *id.* 27a-28a. Neither rationale is persuasive.

First, the Fifth Circuit's opinion amounts to a rule that police officers must allow a high-speed chase to continue as long as it is occurring in a rural area and the getaway driver is skilled at avoiding accidents. But "[i]t is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he" flees the police outside of city limits and he believes he can handle his car deftly. *Scott*, 550 U.S. at 385. "The Constitution assuredly does not impose this invitation[.]" *Id.* at 385-86. Officer Mullenix was under no obligation to "take[] that chance and hope[] for the best." *Id.* at 385.

Second, the Fifth Circuit's opinion is based on the incorrect belief that tire spikes are a foolproof method for ending high-speed chases without casualties. Officers themselves are the people most endangered by tire spikes. As the FBI has explained, deploying tire spikes can be "a real danger for law enforcement officers." Gregory McMahon, *Deployment of Spike Strips*, FBI Law Enforcement Bulletin, Sept. 2012, *available at* http://leb.fbi.gov/2012/september/bulletin-alert-deployment-of-spike-strips. "The use of spike strips began in 1996. Since that time, drivers have struck and killed 26 law enforcement officers, five in 2011—the most since 2003,

which also featured five officer deaths. In at least one of the 2011 deaths, an offender intentionally struck an officer." *Id.*; *see, e.g.*, *Jefferson v. State*, 276 S.W.3d 214 (Ark. 2008) (describing how an officer was killed while placing tire spikes in the street). Indeed, some jurisdictions in Texas prohibit the use of tire spikes altogether for this very reason. *See* Tanya Eiserer, *Dallas Police Ban Use of Spike Strips That Can Halt Fleeing Vehicles*, Dallas Morning News, June 7, 2012 ("Dallas police are banning spike strips out of concern that an officer may be hurt or killed while trying to use the devices. There's an increasing awareness that such tire-deflation devices, once thought to be a useful tool, can be dangerous[.]").

Moreover, even if officers are not injured in the process, tire spikes do not always succeed in ending the high-speed chase. Fleeing suspects often avoid tire spikes by driving dangerously around them. *See, e.g.*, *State v. Jones*, 103 So.3d 420, 421 (La. Ct. App. 2012) (the fleeing suspect avoided tire spikes by driving onto curbs and medians); *Young v. State*, 86 So. 261, 263-64 (Miss. Ct. App. 2011) (the fleeing suspect was able to drive around tire spikes "on multiple occasions"). Fleeing suspects also can continue to drive (and do so dangerously) even when they have run over the tire spikes. *See, e.g. State v. Moyers*, 266 S.W.3d 272, 277 (Mo. Ct. App. 2008) (after driving over tire spikes, the suspect continued an hour long flight going 90 mph on deflated tires); *State v. Johnson*, 220 S.W.3d 377, 379 (Mo. Ct. App. 2007) (the defendant continued to drive after running over two sets of tire spikes); *Athay v. Stacey*, 128 P.3d 897, 900 (Idaho 2005) (the suspect immediately accelerated to 96 mph after driving over spikes and eventually collided with another vehicle while traveling 104 mph). Given these realities, the Fifth Circuit's decision

to place so much reliance on the potential availability of tire spikes was deeply flawed.

Regardless, the potential availability of tire spikes did not constitutionally *require* Officer Mullenix to refrain from using deadly force *until* tire spikes were first deployed. There is no "magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Scott*, 550 U.S. at 382. All that matters, for purposes of qualified immunity, is whether his actions were "reasonable." *Id.* at 382-83. There can be no doubt that they were.

Finally, even if these two factors have some relevance, which they do not, the Fifth Circuit's opinion improperly elevated them over far more probative facts for the qualified-immunity analysis. For example, the court should have focused on the speed of the driver (85-110 mph), the duration of the chase (more than 25 miles over 18 minutes), and the time of the chase (after dark, around 10:30 pm). Even worse, the Fifth Circuit ignored the critical factor at issue: Leija's culpability. In deciding whether Mullenix's actions were reasonable, the Fifth Circuit was required to "consider the risk of bodily harm that [Mullenix's] actions posed to [Leija] in light of the threat to the public that [Mullenix] was trying to eliminate." *Scott*, 550 U.S. at 383. "It was [Leija], after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that [Mullenix] confronted." *Id.* at 384. By contrast, "those who might have been harmed had [Mullenix] not taken the action he did were entirely innocent." *Id.* With Mullenix facing a fleeing, possibly intoxicated criminal who was driving recklessly after

dark and threatening to kill police officers at first sight, there should have been "little difficulty in concluding it was reasonable for [Mullenix] to take the action that he did." *Id.* By focusing on protecting Leija's life above all others, the Fifth Circuit ignored the fact that it was *Leija*—not the officers—who put everyone in this dangerous situation.

Even if Respondent satisfies the first prong of the qualified immunity analysis, however, she still fails at the second prong of the test because it was not "clearly established" at the time of Mullenix's conduct that his actions were unconstitutional. Pet. Br. 21-29. A police officer's conduct violates clearly established law "when, at the time of the challenged conduct, the contours of a right are sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right." *al-Kidd*, 131 S. Ct. at 2083 (emphasis added). This is a demanding standard: "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* Thus, the standard is not whether clearly established law *supported* the officer's use of force; it is whether an officer's conduct was *prohibited* by clearly established law. *See* Pet. Br. 26.

Here, not only was there no precedent prohibiting Mullenix's actions, but the opposite was true: there was clearly established law *endorsing* Officer Mullenix's conduct. The Court in *Scott* could not have been clearer when it "la[id] down a ... sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott*, 550 U.S. at 386. That should have been the end of the

matter. Indeed, the fact that almost half of the judges on the Fifth Circuit believed Mullenix acted reasonably should be conclusive that there was no clearly-established law prohibiting his conduct. *See al-Kidd*, 131 S. Ct. at 2086 (noting that the official was entitled to qualified immunity "not least because eight Court of Appeals judges agreed with his judgment in a case of first impression"); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). For this additional reason, Officer Mullenix should have received qualified immunity for this reason too.

Critical to the Fifth Circuit's refusal to grant immunity to Mullenix was its belief that, because of the summary judgment standard, a reasonable juror could find that the "risk" Leija posed to the public was not "sufficiently imminent" to warrant use of deadly force. Pet. App. 18a. In essence, the Fifth Circuit followed the same path that Justice Stevens laid in *Scott*: "Whether a person's actions ha[d] risen to a level warranting deadly force is a question of fact best reserved for a jury." *Scott*, 550 U.S. at 395 (Stevens, J., dissenting). But as the Court made clear, objective reasonableness is not a question of *fact*; it is a "pure question of law." *Id.* at 381 n.8; *accord Plumhoff*, 134 S. Ct. at 2019 (whether officers' seizure was objectively reasonable is a "legal issue[]."

To be sure, summary judgment requires both that there be "no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). But in the context of qualified immunity in an excessive force case, if reasonable minds can differ over

the objective reasonableness of an officer's seizure, that officer is "entitled to judgment as a matter of law," *id.*, because that is the precise moment immunity attaches: when "officers of reasonable competence could disagree on th[e] [legal] issue." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). By deferring the question to the jury because reasonable minds might disagree over the propriety of Officer Mullenix's actions, the Fifth Circuit improperly "place[d] the question of immunity in the hands of the jury." *Hunter*, 502 U.S. at 228. Because this Court's precedent demands otherwise, the Court should correct the Fifth Circuit's judgment.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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